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VIRGINIA LAW REGISTER

R. T. W. DUKE, JR., EDITOR.
FRANK MOORE AND JAMES F. MINOR, ASSOCIATE EDITORS.

Issued Monthly at $5 per Annum. Single Numbers, 50 cents.

All Communications should be addressed to the PUBLISHERS.

Has the Federal Government Power to Tax Municipal Corporations Engaged in "Business?"

In one or more newspapers in the United States it has been stated that the decision of the Supreme Court of the United States in the case of Flint *v.* Stone Tracy Company, handed down March 13th, 1911, would justify the taxation of incomes derived from waterworks, gas plants, street railways, etc., owned by municipal corporations. That this could not be done under the terms of the present act is clear from a perusal of that law. "Every corporation, joint stock company or association *organized for profit and having a capital stock represented by shares,* and every insurance company, etc., etc., * * * shall be subject to pay annually a special excise tax, etc., etc." The language "every corporation" is certainly very broad, but the language which follows in our judgment plainly limits the kind of corporation to be taxed as one organized for profit and having a capital stock represented by shares. We are borne out in this construction by the fact that no municipal corporation has been called upon to furnish a list showing its income, expenses, etc., etc.

But a perusal of the opinion leaves a very grave doubt as to whether such municipalities could not be held liable by an act passed by Congress for an income tax upon their profits from gas, water and similar things owned by them.

The Court in the case referred to cited South Carolina *v.* U. S., p. 437 which held that the agents of the State Government carrying on the business of selling liquor under State authority were liable to pay the internal revenue tax imposed by the Federal Government. The Court then proceeded to say: "In the opinion previous cases in this court were reviewed and the rule deduced therefrom stated to be that the exemption of State agencies and instrumentalities from national taxation was limited to those of

a strictly governmental character and did not extend to those used by the State in carrying on business of a private character. The cases unite in exempting from Federal taxation the means and instrumentalities employed in carrying on the governmental operations of the State. The exercise of such rights as the establishment of a judiciary, the employment of officers to administer and execute the laws, and similar governmental functions cannot be taxed by the Federal Government." (Cases cited.) "But this limitation has never been extended to the exclusion of the activities of a merely private business from the Federal taxing power, although the power to exercise them is derived from an act of incorporation by one of the states."

Now a municipality owning its water works, gas plant, or street railway is not *quoad* these industries carrying on governmental operations, and so the Court says in the Flint case: "It is no part of the essential governmental functions of a state to provide means of transportation, supply artificial light, water and the like." Such municipalities are as much in "business," as any private corporation engaged in supplying their citizens with water or gas or transportation, and if human language means anything the opinion of the Court cited, although of course mere dictum as to the question discussed, means that the income derived from such industries by the municipalities owning them is subject to the taxing power of the Federal Government.

One may well ponder at the immense power over the states such a construction of the Federal Government's power to tax gives to the Congress; for, as the Court says further in the Flint case, quoting Patton *v.* Brady, 184 U. S. 608: "It is no part of the function of a court to enquire into the reasonableness of the excise either as respects the amount or the property upon which it is imposed." And again: "The argument at last comes to this: that because of possible results, a power lawfully exercised may work disastrously, therefore the courts must interfere to prevent its exercise because of consequences feared. No such authority has ever been invested in any court. The remedy for such wrongs, if such in fact exist, is in the ability of the people to choose their own representatives and not in the exercise of unwarranted powers by courts of justice."

Given, therefore, the power to tax the income of municipalities derived from water, gas, transportation, etc., the power must follow to allow to a large extent the inspection, and to a certain extent regulation of these industries by the Federal Government. The United States Collector and Deputy Collector become a part and parcel of the municipal machinery and one more grip is laid upon the already contracted throat of the Sovereignty of the States.

Contracts in Restraint of Trade.

It is truly refreshing now and then in this statute ridden age to see the courts harking back to the old common law and finding that it contains within its broad bosom the remedy for many an evil, which renders new law unnecessary. In the case of Dr. Miles Medical Co. *v.* John W. Park & Sons Company, decided by the Supreme Court of the United States April 3rd, 1911, that Court holds that under the common law, as well as under the anti-trust act of July 2nd, 1890, contracts between a manufacturer and all dealers whom he permits to sell his products—comprising most of the dealers in similar articles throughout the country—which fix the price for all sales whether at wholesale or retail, operate as a restraint of trade and are unlawful, even though such products may be proprietary medicines made under a secret formula.

Justice Lurton took no part in the decision, but Justice Holmes dissents in a brief but almost spicy opinion which indicates some little temper hardly justified, it seems to us; for the decision is one so clearly right we hardly see any reason for dissent. But Justice Holmes says:

> "There is no statute covering the case; there is no body of precedent that, by ineluctable logic (how deliciously Bostonese the adjective) requires the conclusion to which the court has come. The conclusion is reached by extending a certain conception of public policy to a new sphere. On such matters we are in perilous country. I think that at least it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear." (How "horrid" this doctrine would have sounded to Gar-

rison and Wendell Phillips and Charles Summer sixty years ago, and yet it is sound, good doctrine.)

"We none of us can have as much as we want of all the things we want." Then in the language of the Grande Duchesse, "Si on ne peut pas avoir ce qu'on aime, il faut aimer ce qu'on a."*

And again—"The analogy relied upon to establish that evil effect (i. e., of the contract in the case) is that of combinations in restraint of trade. I believe we have some superstitions on that head." And then he concludes: "I think also that the importance of the question and the popularity of what I deem mistaken notions makes it my duty to express my views."

Now the decision does not seem to us very radical, but sustained by good old common-law doctrine. Miles manufactured patent medicine, and patent contracts by which "wholesalers" under one form of contract were restricted and limited as to trade in the articles made by Miles. Four hundred jobbers were bound under this form. Under the other twenty-five hundred "Retailers" were duly tied up and pains and penalties visited upon them for selling to anybody except under the terms of these contracts.

Parks bought Miles' medicine—but not from Miles. He was a "cut rate" and no "cut throat" contracts for him. He naughtily induced some of Miles' contractors to violate their agreements and got the stuff which Miles made at lower rates than those at which wholesalers and retailers were allowed to sell, and Miles prayed an injunction to stop Parks in his wicked way. But Mr. Justice Lurton in the Circuit Court declined to interfere, though his aid was invoked under the well-established doctrine that an actionable wrong is committed by one who maliciously interferes with a contract between two parties and induces one of them to break that contract, to the injury of the other, and that in the absence of an adequate remedy at law, equitable relief will be granted. Angle *v.* Chicago, etc., 151 U. S. 1; Bitterman *v.* L. & W. R. R., 207 U. S. 207.

But the lower court said, and the upper court sustained it, that the restrictive agreements were in restraint of trade and void. The contracts are too long to set out, but were ingenious efforts to "disguise the wholesale dealers in the mask of

*If one cannot have what one loves, one must love what one has.

agency," and only permitted them to sell to those retail dealers who were designated retail agents of Miles. Competition was absolutely destroyed, for retailers could only buy of "contracted" wholesalers and then could not sell except at fixed prices and even then to no persons to sell again unless such person was authorized to buy by Miles. Judge Lurton held such contracts were void at common law and under the act of July 2nd, 1890, and we cannot see how the Supreme Court could have decided otherwise than it did—Mr. Justice Holmes to the contrary, notwithstanding.

Public Policy and Contracts in Restraint of Trade.

We trust that the little fun which we have had at the expense of Mr. Justice Holmes as to his dissenting opinion above referred to may be pardoned by that distinguished jurist, if he ever sees our editorial, which is not at all probable, but the questions of public policy and contracts in restraint of trade have given rise to a great many decisions, some of which concur with the view he takes. The *argumentum ab inconvenienti* was probably the foundation of the decisions declaring contracts void as against public policy. Covenants in restraint of trade have now for two hundred years, exactly, been held against public policy, but no branch of law has been subject to more fluctuations than this, from the leading case of Mitchel *v.* Reynolds (1711), which established the common-law doctrine that such a contract ought to be maintained wherever it is "such as cannot be set aside without injury to a fair contractor," down to the Maxim Nordenfelt Case (1894), in which the House of Lords laid it down that "the sole test of the validity of a contract in restraint of trade is its reasonableness in the interests of the covenantee." A proviso was, however, added to this last decision, that "the covenant must not otherwise offend against public policy," and in this introduction of an ambiguous phrase rather, its re-introduction, for the same qualification had been made the battle-ground of many previous cases—much of the value of this carefully weighed decision of the final Court of Appeal was lost. With that great common sense which distinguished all of his judgments, Sir George

Jessel, M. R., had declared, in dealing with this subject (in The Numerical Registering Company *v.* Sampson (1875)), that "if there is one thing more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice." But Lord Watson's judgment in the Maxim Nordenfelt Case contained a warning that quite other considerations than these might in time prevail, and he openly declared that the "rule of public policy" was a fluctuating rule, and that it was the function of the Courts when cases like these were brought before them "to ascertain, with as near an approach to accuracy as circumstances permit, *what is the rule of policy at the present time.*"

And our own Supreme Court of the United States has followed Lord Watson in Pope's Manufacturing Company *v.* Gormully, 144 U. S. 224, holding that the standard of such a policy is not invariably fixed, since contracts which at one stage of our civilization may seem to conflict with public interests, at a more advanced stage are treated as legal and binding; and in a later case, United States *v.* Trans-Missouri Freight Association, 166 U. S. 290, that Court has said: "The public policy of the government is to be found in its statutes and when they have not directly spoken, then in the decisions of the courts and the constant practice of government officials, but when the law-making power speaks upon a particular subject over which it has constitutional power to legislate, public policy in such a case is what the statute enacts."

In Baltimore & Ohio Railway *v.* Voight, 176 U. S., the Court holds that the right of private contract is no small part of the liberty of the citizen, and the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligations on the pretext of public policy, unless it clearly appear that they contravene public right or public welfare. But taking it altogether the almost fixed policy of the Supreme Court is to hold any contract which in the slightest way is in restraint of trade to be illegal. Addyston, etc., *v.* Pipe, etc., Co., 175 U. S. 211; U. S. *v.* Knight Co., 156 U. S. 1; U. S. *v.* Trans-Missouri

Freight Ass'n, 166 U. S. 290; Butcher's Union *v.* Cresent City, 111 U. S. 746; Joint Traffic Case, 171 U. S. 505, and other cases too numerous to mention.

The Standard Oil Co. Cases.

The foregoing editorials on Restraint of Trade were written before the opinion of the Supreme Court of the United States was handed down in the above mentioned case. We now have added to the cases mentioned another case which certainly establishes the truth of the remark made by Justice Brown in Pope Mfg. Co., etc., *v.* Gormully, supra, that the standard of the policy in regard to such contracts is not fixed. That distinguished lawyer and brilliant wit, the late Robert Whitehead of the Nelson Bar, used to say that he knew any decision which pleased both sides was in the very nature of things wrong and judged by this criterion the decision in the Standard Oil Cases cannot be right; for the Government hails it as a victory—the company's attorneys seem satisfied with it, while the general public holds its breath and wonders. The opinion is too long to quote in this editorial, but the general result can be summed up in a few words.

The court, confirms the decree of the Circuit Court of Appeals dissolving the Standard Oil Company, but upon the definite ground that it has long violated, and does violate, the first section of the Sherman law by an actual restraint of trade, and that it violates the second section of that statute by vice of the fact that it is a monopoly. This corporation or holding company must, therefore under the terms of the modified decree, within six months discontinue business, it must place the shares and the control of its subsidiary companies in the hands of their actual owner and it is forbidden by any device of trusteeship or any other such act to continue its control over the subsidiary corporations or over the production or transportation of petroleum and its products in interstate commerce.

The court holds that corporations whose contracts are not *unreasonably* in restraint of trade are not affected by this decision, that all such corporations against which actions may be brought must be dealt with according to the merits of the par-

ticular cases. *Unreasonable* restraint of trade and the monopolizing of or the attempt to monopolize trade being absent, such corporations, it is to be inferred from the language of the decision, will not be held to be doing business in violation of law.

The opinion delivered by the Chief Justice reviews former decisions of the Court which have given a different interpretation to the act. It will be recalled that, as Mr. Justice White, he dissented in the Northern Securities Case, Mr. Justice Holmes concurring with him in that dissenting opinion. Of the Judges who sat in that case only JJ. Harlan, Day, and McKenna with the two first mentioned are now upon the bench—four new members—JJ. Lurton, Van De Venter, Lamar and Hughes having been appointed since the date of that decision. This case, following what Mr. Justice Harlan said was the result of certain propositions plainly deducible from the former opinions of the Court, held that the act of Congress embraced and declared to be illegal "every contract combination or conspiracy in whatever form, of whatever nature and whoever may be parties to it, which directly or necessarily operates in *restraint of trade* or commerce *among the several states or with foreign nations.*" In the case of U. S. *v.* Trans-Missouri Freight Association, 166 U. S. 291, Mr. Justice White dissented. Mr. Justice Peckham delivered the opinion of the Court and said:

> When, therefore, the body of the act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, &c., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress.

Of the judges who were on the bench when this last-named decision was made only Harlan and White survive. Harlan concurred with Peckham. So the "whirligig of time" brings as usual its "revenges." Chief Justice White has brought over to his views every new member of the Court as well as JJ. Day and McKenna, who were formerly against him, and the proposition so clearly deducible from the former opinion of the Court is relegated to the "lumber room and charnel house of time." But Justice Harlan sticks to his colors. In an oral

dissenting opinion he refers to case after case which the present decision overrules. He prefaces his dissenting opinion as follows:

> As to all the Chief Justice has said about the illegal combination of this oil company and its coming within the Anti-Trust act I cordially concur. There are, however, some things in this opinion, and that are to result from this opinion, which I think may very well alarm thoughtful men, or many thoughtful men, and I am unwilling to let them pass with any idea that I approve them.

Then he takes up the leading cases on the subject, calls attention to the fact that in three several instances this very question was argued and decided there was nothing left for the Courts to do further. If relief was wanted for *reasonable* trusts there was the Congress to be called in to their aid to amend the Sherman act and as Congress had not acted the Courts could do no more. He then concludes:

> In the now not very short life that I have passed in this Capital and the public service of the country, the most alarming tendency of this day, in my judgment, so far as the safety and integrity of our institutions are concerned, is the tendency to judicial legislation, so that, when men having vast interests are concerned, and they cannot get the lawmaking power of the country which controls it to pass the legislation they desire, the next thing they do is to raise the question in some case, to get the court to so construe the constitution or the statutes as to mean what they want it to mean. That has not been our practice.
>
> The reports of the decisions of this court are full of cases in which the litigants have urged upon this court:
>
> "You have in a case heretofore construed this act of Congress wrongly."
>
> "Well," says the court, "that may be true, but it is an act that relates to a question of public policy. We have announced this as our view. It has gone through the country, and been accepted and acted upon."
>
> I suppose millions of dollars of property have changed hands under those decisions of 1896 and 1898. Prosecutions have been instituted, and I suppose men have been convicted and sent to jail under the anti-trust act upon the construction that this court has given to it.
>
> The court, in the opinion in this case, says that this act of Congress means and embraces only unreasonable restraint of trade—in flat contradiction to what this court

has said fifteen years ago that Congress did not intend. If you will take the trouble to look through the Federal Reporter you will find that possibly nearly every Federal court in this country has accepted those original decisions as the final decision of this court as to the meaning of the act of Congress. Now we are asked to change the rule and to say:

"It may be true that, in the words of the statute, this contract or this agreement is in restraint of inter-State trade. It may be. But it is a lawful restraint of trade. It is a lawful restraint." Contrary to the decision of this court. I say, contrary to the practice and usages of this court.

If I mistake not, more than once at this term a lawyer has been compelled to take his seat, to stop the particular line of argument that he was pursuing, because he was arguing against a former decision of the court on that very question. He was wanting to break down that former decision.

Within the last hour, at any rate, an opinion has been handed down for this court to-day in which, in a case arising under the Safety Appliance act it was said that such and such was the Safety Appliance act, such and such was its meaning; that this court has so regarded it in a case decided four or five years ago. Now, we said, in reply to that:

"In view of these facts, we are unwilling to regard the question as to the meaning and scope of the Safety Appliance act, so far as it relates to automatic couplers on trains moving interstate traffic, as open to further discussion. If the court erred in the former case, it is open for the parties to apply for such an amendment of the statute as Congress may, in its discretion, deem proper. This court ought not now disturb what has been so widely accepted and acted upon by the courts as having been decided in that case. A contrary course would cause infinite uncertainty, if not mischief, in the administration of the law in the Federal courts."

It is quite true that what was said in that case concerned only the lives and the limbs of railroad employees and passengers. However important the law may be, we will not consider the question as to whether this former construction is right, because if we are wrong, go to Congress and get the legislation. That is one case. While this happens to be a case of an overshadowing combination of such vast wealth and enormous power that it may fairly be deemed a menace to the general business interests of the country, this difference ought not to induce us to depart from a settled, wholesome rule which, being faithfully observed, will

guard the integrity and secure the safety of the Nation and of its institutions against the attacks of those who would undermine all law and who would, for the sake of present advantages and ends be willing to undo the work of the fathers.

Why do I say to undo the work of the fathers? If there is any feature in our Governmental system that is now among the nations of the earth, it is that provision of the Federal Constitution which divides the departments of government among three co-ordinate branches—legislative, executive, and judicial; and neither branch has the right to encroach upon the domain of the other.

Practically the decision to-day—I do not mean the judgment, but parts of the opinion—are to the effect practically that the courts may, by mere judicial construction amend the Constitution of the United States or an act of Congress. That, it strikes me, is mischievous; and that is the part of the opinion that I especially object to.

I shall put my views in writing hereatter, when I get an opportunity to do so. There is much more that I wanted to say, but I cared only to emphasize that objection to the opinion of the court.

"Now here's a state of things." The Chief Justice is consistent. His dissenting opinions have become the opinion of the Court. Justice Harlan is consistent, his opinions when he spoke for the majority of the Court are still his unchanged opinions. Then the question resolves itself to this: "Is the Court consistent?" There can, we think, be only one answer to that question.

Wytheville Term of the Supreme Court.

The Supreme Court of Appeals meets for the present session on the 30th day of May. There are some fifty cases on the docket and there seems every indication that the docket will be concluded during the term.